Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHRISTOPHER EPISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether due process demands that a ruling on a defendant's petition for post-conviction relief should be based on accurate facts?

2. Whether a verdict of guilt rendered by a jury can stand, when the trial court in a post-conviction proceeding discounted critical evidence that the jury had heard. The effect being that the remaining evidence against the defendant amounted to "inference piled upon inference."

LIST OF PARTIES

Petitioner in this case is Christopher Epison. Other Petitioners from the lower court include Larry Martin, Carlos Curry, Stanley Wright and Harold Williams.

The Respondent is the United States of America.

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OPINION BELOW

The December 22, 2000 unpublished Order of the Court of Appeals and the February 7, 2001 Order correcting errors in that Order, and denying Petitioners' Petition for rehearing *en banc* are both attached as Appendix A.

JURISDICTION

The final decision of the Court of Appeals was entered on February 7, 2001. Jurisdiction of the Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in part, as follows:

> No person shall be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In 1991, a grand jury indicted the Petitioners and nineteen other persons, charging them with conspiracy to distribute cocaine, and other related offenses. The activity involved a drug operation headed by Mario Claiborne that began in 1986, and lasted until June 14, 1991, when Claiborne was arrested. The jury trial, in front of U.S. District Judge Rudy Lozano, began on April 7, 1992, and ended on June 1, 1992 with the defendants' convictions.

Petitioners Martin and Wright received life sentences; Williams and Curry, 30 years in prison; and Epison, 11-1/2 years.

The Seventh Circuit Court of Appeals affirmed the convictions of all defendants, but vacated the sentences of Wright and Williams. *U.S. v. Willis*, 49 F.3d 1271 (7th Cir. 1995). On resentencing, Wright received a prison term of 235 months, and Williams a term of 210 months.

After the last appeal, Petitioners filed motions for new trial, based on newly-discovered evidence, under Rule 33 of the Federal Rules of Criminal Procedure. On March 5, 1999, Judge Lozano denied the motions. *U.S. v. Willis*, 43 F. Supp. 2d 873 (N.D.Ill. 1999). That decision was appealed to the Seventh Circuit, which, on December 22, 2000, affirmed the District Court's judgment. That decision, in the form of an unpublished order, is attached in Appendix A. Petitioners filed a Petition for Rehearing *en banc*. That Petition was denied on February 7, 2001. A copy of that denial Order is attached in Exhibit A. This Petition followed.

REASONS FOR GRANTING THE WRIT

DUE PROCESS DEMANDS THAT A RULING ON A DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF SHOULD BE BASED ON ACCURATE INFORMATION.

Long after Petitioners' trial had concluded and they had been sent away to federal prison to serve their lengthy sentences (in Martin's case, a life sentence), defense counsel became aware of evidence of misconduct

among the investigating agents of the Drug Enforcement Administration. DEA Special Agent Peter Probst, who accused his fellow agents of racism, incompetence, theft and dishonesty, had brought much of that misconduct to light. Rather then investigate the charges, the DEA suspended Probst for making them. He fired back with a lawsuit against the DEA, and received $180,000 in damages from that agency. *Probst v. Reno*, 917 F. Supp. 554 (N.D.Ill. 1995).

Petitioners had no knowledge of the goings-on behind the scenes of the DEA during the trial. It was only years later that Probst's allegations became known. Any charges of racism, theft, etc., by one DEA agent against the others, all of whom were involved in this particular investigation and prosecution, would have been used at trial as impeaching evidence at the very least.

Judge Lozano and the Seventh Circuit did not see it that way. The latter court, in affirming Judge Lozano's denial of a new trial, minimized the Probst evidence in its Order:

- On page 3, the Court stated that in its settlement with Probst, "the DEA admitted no liability."
- On page 12, the Court looked favorably on the District Court's finding "that because the DEA never admitted liability in that case, the settlement does not demonstrate that Probst's accusations of DEA racism and misconduct were accurate, and thus information about the settlement would probably not lead to an acquittal in the event of a retrial."

There is just one problem with the Seventh Circuit's reasoning: It is wrong, based on a misreading of the agreement between Probst and the government.

Unlike the District Court in this case, Judge James Holderman held a full hearing to determine the truth of Probst's claims. That hearing resulted in the *Probst* opinion, cited above. On pp. 558-59, the parties agreed to certain issues of fact. One of those issues, agreed to by the government, was that Probst's "working environment during the Claiborne investigation was permeated by racial discrimination." 559, fn. 2. Furthermore, the DEA agreed that "the racial discrimination continued after November 12, 1991." 559, fn. 4. The District Court agreed with those findings. 560.

So where did the District Court and Court of Appeals come up with the idea that the DEA never admitted liability? The only possible explanation is found at *Probst*, 558, stipulation NO. 5: "The parties agree that neither this Agreement, nor any negotiations or proceedings in connection herewith, shall in any manner constitute, as admission on the part of defendants of a violation of Title VII of the Civil Rights Act, or a violation of law whatever, whether as alleged in this litigation or otherwise."

In short, the DEA admitted that Probst was correct in saying that there was racial discrimination permeating the Claiborne investigation, but we, the DEA, do not admit that such racial discrimination constituted a violation of the Civil Rights Act.

That bit of legal legerdemain does not comply with the contention that "the DEA admitted no liability." Both the District Court and the Court of Appeals misread the facts in denying Petitioners' motions for a new trial. That is a violation of their Fifth Amendment right to due process.

This Court has long held that a prisoner has the Constitutional right to be sentenced based on accurate information. *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *U.S. v. Tucker*, 404 U.S. 443, 447 (1972). Here, the Petitioners were not asking for a mere re-sentencing; they were demanding a new trial based on newly discovered evidence. If it is a Constitutional violation to use inaccurate information to sentence, *a fortiori*, it is even a more egregious violation to use inaccurate information to prevent someone from getting a fair trial.

To make matters worse, Petitioners saw evidence of the Seventh Circuit's misreading of the *Probst* facts in the Court's unpublished Order. As stated by Judge Holderman, Agent Probst's "race is white." *Probst* at 555. Yet, the Seventh Circuit's Order twice refers to Probst as Black. The embarrassed Court tried to correct its error in its February 7, 2001, Order, but it was too late. Petitioners had seen that the Court of Appeals had not even closely read the *Probst* case or Petitioners' briefs to properly judge this case.

CHRISTOPHER EPISON

WHETHER A VERDICT OF GUILT RENDERED BY A JURY CAN STAND, WHEN THE TRIAL COURT IN A POST-CONVICTION PROCEEDING DISCOUNTED CRITICAL EVIDENCE THAT THE JURY HAD HEARD. THE EFFECT BEING THAT THE REMAINING EVIDENCE AGAINST THE DEFENDANT AMOUNTED TO "INFERENCE PILED UPON INFERENCE."

The government presented very little evidence against Mr. Epison. The entire case against Mr. Epison

rested upon the testimony of five witnesses, four of whom are law enforcement officers who participated in what we now know to be the deeply flawed Claiborne Investigation. The fifth witness (Eula Scott) had already been impeached because she was testifying in exchange for a substantially reduced sentence and, in any event, her testimony alone would never have sustained the verdict. Two out of three of the incidents described in government testimony did not involve any proven narcotics. Surveillance agents saw only "packages" of unknown contents. Eula Scott similarly failed to link Mr. Epison directly with Claiborne's drug enterprise.

The linchpin witness of the prosecution case was Wooten, who sat at the counsel table during the entire trial and provided the only testimony linking Mr. Epison to an illegal substance. As we now know, and as he knew at trial, Wooten stole $12,700 cash from the evidence seized in this case and then lied during the internal inquiries about having done so: Ultimately under oath.

The trial court, (with the approval of the appellate court) concluded that its confidence in the outcome against Epison was not undermined because "Wooten's testimony about the trash evidence was a small link in an otherwise substantial chain of circumstantial evidence." The court did not go further, however, and consider that without the testimony of Wooten, the only other evidence left against Epison amounted to "piling inference upon inference." This Supreme Court has stated that "piling inference upon inference" is a practice of which it

strongly disapproves. *Anderson v. U.S.*, 417 U.S. 211, 224 (1974).

CONCLUSION

WHEREFORE, Petitioner, CHRISTOPHER EPISON, respectfully prays that this Honorable Court, in light of the arguments raised above, grant this petition and issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

CHRISTOPHER EPISON, Pro-Se

APPENDIX

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued June 6, 2000
Decided December 22, 2000

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

Nos. 99-1679, 99-1680, 99-1687, 99-3556 & 99-3557

United States of America,

Plaintiff-Appellee,

v.

Larry Martin, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 91 CR 463

Rudy Lozano, *Judge.*

ORDER

After a seven-week jury trial, Larry Martin, Stanley Wright, Harold Williams, Christopher Epison, and Carlos Curry were convicted of conspiracy to distribute cocaine. Their convictions were affirmed on appeal, but this court vacated and remanded for re-sentencing as to Wright and Williams. *United States v. Willis*, 49 F.3d 1271 (7th Cir. 1995).

After the defendants' convictions were affirmed on appeal, information surfaced about misconduct by Drug Enforcement Agency officials who investigated the conspiracy and testified at the trial. Thus all of the defendants filed motions for a new trial, alleging that the government violated their due process rights by failing to disclose evidence that was favorable to the defense and now undermines confidence in the verdicts. Some defendants also filed motions for an evidentiary hearing so that they could further assess whether all of the undisclosed information warranted a new trial. The district court denied the motions, concluding that there was no reasonable probability that the undisclosed evidence would have changed the outcome of the trial, and that there was no reason to believe that an evidentiary hearing would produce evidence justifying a new trial.

On remand for the re-sentencing of Wright and Williams, both defendants requested downward departures in their sentences for assisting the government, accepting responsibility, and for being minor participants in the conspiracy. The district court denied all requests for downward departures.

All five of the defendants appeal the denial of their motions for a new trial and an evidentiary hearing, and Wright and Williams appeal their new sentences. We affirm.

I.

Mario Claiborne, as the leader of the "Claiborne conspiracy," orchestrated the distribution of several hundred kilograms of powder and crack cocaine in Chicago from

1986 to 1991. He procured the cocaine and arranged to have it distributed on the street by couriers and distributors. Group 12 of the Chicago Field Office of the Drug Enforcement Administration (DEA) worked on the Claiborne investigation. Agent James Woolley supervised the Group 12 agents, among them being Special Agents Peter Probst, John Wooten and Michael Kress. Probst served as the initial case agent for the Claiborne investigation before Wooten took over, and Joseph Vanacora, the Associate Special Agent in Charge of the DEA's Chicago Field Division, supervised all of the agents.

At trial, Probst and Wooten testified for the government, while Kress was called to testify by defendant Epison. On June 1, 1992, following a seven-week trial, the jury convicted all of the defendants in this appeal of participating in the Claiborne conspiracy to distribute cocaine (primarily in the 44th and Greenwood-Berkeley area), and the court sentenced them to lengthy terms.

The defendants appealed their convictions. This court affirmed the convictions, but vacated and remanded for re-sentencing as to Wright and Williams. *Willis*, 49 F.3d 1271. After remand, information surfaced about misconduct by Group 12 agents during the Claiborne investigation and trial, and thus all of the defendants filed motions for a new trial, alleging that pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), the government violated their due process rights by failing to disclose information that was material to the outcome of the trial. The defendants' *Brady* argument is based on evidence that Wooten stole $12,704.00 of currency that was seized in the Claiborne investigation; that he improperly stored other evidence in the investigation;

and that he falsely denied the theft and asserted that evidence in the case had been handled properly. The defendants assert that this evidence was favorable to the defendants and that they would have used it to impeach Wooten's credibility at the trial.

Further evidence of DEA misconduct centered around Probst, who filed a civil rights lawsuit in 1994 against the DEA. Discovery in that suit disclosed that during the Claiborne investigation, Probst accused his fellow agents of incompetence, theft, racism and dishonesty. The lawsuit also revealed that Probst was under investigation by the DEA for interpersonal conflicts with other agents during the Claiborne investigation, and that he feared losing his job. The parties eventually entered into a settlement in which the DEA admitted no liability, and the district court awarded Probst $180,000.00 in compensatory damages. According to the defendants-appellants, they would have used Probst's allegations to attack the integrity of the evidence and to impeach the credibility of DEA agents who testified for the government at the trial.[1]

The defendants also argue that newly discovered evidence of post-trial events warrants a new trial. They

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[1] The defendants make passing mention in their briefs about further misconduct by DEA agents Frank Tucci and James Massey, as well as witness Jimmie Lee Collins. But because the defendants have failed to present legal arguments about how the newly disclosed information about these individuals' alleged misconduct warrants a new trial, these arguments are waived. *See United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000) (perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived).

claim that the information about Probst's 1994 settlement award bolsters the credibility of his accusations about DEA misconduct during the Claiborne investigation. And the defendants assert that the newly discovered fact that Wooten pleaded guilty to fraud charges in 1995 would further undermine his credibility in the event of a new trial.

The district judge (who also presided over the seven-week jury trial) denied the defendants' motions for a new trial, concluding that there was no reasonable probability that had the evidence been disclosed, the result of the trial would have been different, or that the newly discovered evidence, along with the undisclosed evidence, would lead to an acquittal in the event of a retrial. *United States v. Willis*, 43 F.Supp.2d 873 (N.D. Ill. 1999). The defendants appeal the denial of their motions for a new trial.

Some of the defendants also sought an evidentiary hearing so that the district court could further assess all of the undisclosed and newly discovered evidence. But the district court denied those motions as well, concluding that an evidentiary hearing would only amount to a "fishing expedition" for the defense because there was no reason to believe that it would produce evidence that would warrant a new trial. *Id.* at 890. The defendants also appeal the denial of their motions for an evidentiary hearing.

In the decision to remand Wright and Williams for resentencing, this court expressed concern with the district court's attribution, for sentencing purposes, of the conspiracy's entire sales of 216 kilograms to these two "street

dealers." On remand, Wright and Williams admitted their guilt and agreed to assist the government's case in the event of a retrial. In return, the government moved, pursuant to U.S.S.G. §5K1.1, for a downward departure of their sentences. Wright and Williams also moved, according to U.S.S.G. §3E1.1, for a two-point reduction in their offense levels for acceptance of responsibility, and, pursuant to U.S.S.G. §3B1.2(b), for a two-point reduction for being minor participants in the conspiracy. The district court denied all of these motions, finding that Wright and Williams were not minor participants, and that their admission of guilt and assistance to the government were untimely. Instead, the district court granted a one-level departure for both defendants, found them responsible for 12.5 kilograms of cocaine base (the amount distributed in the 44th and Greenwood-Berkeley area during their involvement in the conspiracy), and sentenced them to 235 months and 210 months imprisonment, respectively. Wright and Williams appeal their new sentences.

II.

A. Motions for a New Trial

1. The alleged *Brady* violations.

The defendants first argue on appeal that the district court abused its discretion in denying their motions for a new trial, claiming that the government violated *Brady* by suppressing evidence that was favorable to the defense and material to the outcome of the trial. The defendants claim that the undisclosed evidence is material because it discredits the investigation and significantly impeaches the credibility of Wooten, Probst and Kress, three DEA

agents who were involved in the investigation and who testified at the trial. The district court made evidentiary rulings and determined that most of the alleged *Brady* material would not have been admissible at trial, and that the remaining admissible evidence would not have been material under *Brady*.

We review the district court's decision to deny a new trial for an abuse of discretion, *United States v. Hartbarger*, 148 F.3d 777, 786 (7th Cir. 1998), "which means that we will affirm unless no reasonable person could agree with the district court." *Nelson v. Apfel*, 210 F.3d 799, 802 (7th Cir. 2000). Thus, we approach this appeal "with great caution and are wary of second-guessing the determinations of both judge and jury." *United States v. Woolfolk*, 197 F.3d 900, 904 (7th Cir. 1999) (quoting *United States v. DePriest*, 6 F.3d 1201, 1216 (7th Cir. 1993)). We must also emphasize that because the district judge presided over the lengthy trial, he has an intimate knowledge of the case and thus is "uniquely suited" to determine whether a new trial is warranted. *Aleman v. United States*, 878 F.2d 1009, 1012 (7th Cir. 1989). We review the district court's evidentiary rulings for a clear abuse of discretion, *United States v. Adames*, 56 F.3d 737, 746 (7th Cir. 1995), affording "great deference" to the court's judgment. *United States v. McCulley*, 178 F.3d 872, 875 (7th Cir. 1999). And because the trial judge is "best positioned" to determine whether evidence was material under *Brady*, we review that determination for an abuse of discretion as well. *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995).

In *Brady*, the Supreme Court set forth the basic principle that the prosecution violates due process by suppressing evidence that is favorable to the defense and

material to either the guilt or punishment of the accused, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. To receive a new trial under *Brady*, the defendants must establish that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. *Hartbarger*, 148 F.3d at 786. Evidence is material only if there is a "reasonable probability" that its disclosure would have changed the result of the trial. *Id.* (quoting *Silva*, 71 F.3d at 670). In other words, evidence is material if, in light of the "trial record as a whole," *United States v. Williams*, 81 F.3d 1434, 1438 (7th Cir. 1996), the evidence "undermines confidence in the outcome of the trial." *Hartbarger*, 148 F.3d at 786.

We will analyze each category of undisclosed evidence individually, and then determine whether the district court abused its discretion in concluding that the evidence was not admissible or material, and that its cumulative effect does not undermine confidence in the jury's verdicts.

a) The Probst Information

As noted above, Agent Probst filed a civil rights lawsuit against the DEA which exposed possible incompetence, theft, racism and dishonesty among other agents and which resulted in a $180,000 settlement for Probst. Because the activity that caused these accusations occurred during the Claiborne investigation and trial, the defendants now argue that this information warrants a new trial because it discredits the investigation and impeaches the credibility of Probst and Kress. Discovery

in the case also brought out allegations that Probst's colleagues reported that he was abrasive, difficult to work with, and possibly paranoid. Also, apparently after Probst filed an administrative grievance with the EEOC, Vanacora, the agent in charge of the Chicago Field Division, initiated a DEA internal investigation into Probst's alleged "misconduct and insubordination." Agent Probst, who is black, believed that he was being investigated in retaliation for his complaints that Wooten, another black agent, was being mistreated because of his race. At the conclusion of the one-year investigation, Probst was suspended for ten days, without pay, which he served in May 1993.

Probst's accusations of racial bias were based on alleged remarks by Woolley that the Claiborne investigation was not as important as other drug conspiracies with a South American connection, and that "[A]ll you got here is niggers selling dope to niggers? There's no harm or foul there."[2] Probst also claimed that after he filed the EEOC report, he received several latenight phone calls in which the anonymous caller would hang up, or, on two occasions, said "nigger lover" before hanging up. And, according to Probst, other agents attempted to disrupt the investigation (by failing to properly conduct and report on surveillance activities) because it was headed by two black agents, Probst and Wooten. The defendants argue that Probst's accusations discredit the investigation because they indicate that Group 12 agents were racists who disrupted an investigation that was headed by black agents and targeted black defendants.

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[2] Woolley has denied making any racist remarks.

After carefully assessing the defendants' claims, the district court concluded that this evidence was either not admissible or not material under *Brady*. *Willis*, 43 F.Supp.2d at 879-883. Regarding Probst's allegations of racial bias, the court explained that because Woolley never testified at the trial, his alleged racism is not "automatically relevant." *Willis*, 43 F.Supp.2d at 880. The court also concluded that the evidence of racial bias among the other Group 12 agents was of questionable probative value because none of the anonymous phone callers were ever identified, and because Wooten actually denied that he was the target of racial discrimination. *Id.* The court pointed out that Wooten had admitted that to avoid angering Probst, he lied to him by stating that he too was the target of discrimination. In fact, Wooten had actually reported that Probst was harassing him by pressuring him to file an EEOC complaint. *Id.*

The district court then determined that even if racial prejudice existed, such evidence would not have been material under *Brady*. *Id.* The defendants never identified one instance where racial prejudice influenced the case, and have never alleged "that any agent acted illegally, unfairly, or even aggressively" toward any of the defendants because of their race. *Id.* at 880-881. The court also recognized that Woolley's alleged remark actually downplayed the importance of the investigation, and that if, as Probst alleged, DEA agents neglected their surveillance duties, that fact would have tended to undermine the prosecution's investigation. *Id.*

The district court concluded that because there is no link between the alleged racism and harm to any of the defendants, the probative value of Probst's accusations

"was substantially outweighed by the danger of side-tracking the jury and misusing time on a mini-trial on racism within Group 12," and thus was inadmissible under Rule 403. *Id.* at 881. The court also noted that even if the evidence was admissible, it was not material under *Brady* because there is no specific indication that the alleged racism influenced the case, and thus it does not undermine confidence in the verdicts. *Id.*

We conclude that the district court did not abuse its discretion in denying these *Brady* claims involving Probst's allegations of racial bias. The court properly determined that Woolley's alleged remarks were inadmissible because he never testified at the trial. *See Silva*, 71 F.3d at 670-71 (because the credibility of a non-witness was not an issue in the trial, evidence to impeach him would have been irrelevant and consequently inadmissible). And we see no need to second-guess the district court's Rule 403 ruling to preclude the remaining allegations of racial bias among Group 12 agents. *See United States v. Crockett*, 979 F.2d 1204, 1211 (7th Cir. 1992) (quoting *United States v. Glecier*, 923 F.2d 496, 503 (7th Cir. 1991)) (we will afford "a special degree of deference" to the district court's Rule 403 determinations and second-guess them only in extreme cases).

Probst also admitted in his 1994 civil rights lawsuit that during the Claiborne investigation, he feared that he would be fired as a result of the internal DEA investigation of his work. The defendants argue that this evidence was material because it evinces Probst's bias in the Claiborne investigation in that he had a high personal

stake in its outcome and thus sought to curry favor with the government.[3]

The district court noted that Probst actually stated that he believed that he would be fired if he "was anything less than an outstanding employee," and that he "felt compelled to 'put out 110 percent' every day or be fired." *Willis*, 43 F.Supp.2d at 882. According to the district court, the defendants "read too much into" Probst's statements, which do not indicate that he felt compelled to ensure convictions at all costs. *Id.* And no defendants have suggested that Probst had done anything improper. Thus the district court concluded that this evidence was inadmissible under Rule 403 because any probative value of the pressure that Probst felt from the investigation "would have been substantially outweighed by the possibility of sidetracking the jury and misusing time by opening the door to a detailed examination of the investigation of Probst." *Id.*

We see no abuse of discretion because the evidence of Probst's mental state provides only marginal evidence (if any) of bias, and thus the trial judge's determination that the evidence was inadmissible under Rule 403 was certainly within his "wide latitude to impose reasonable limitations on cross-examination" based on concerns about bias. *United States v. Saunders*, 166 F.3d 907, 920 (7th Cir. 1999).

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[3] The defendants also suggest in one sentence that the district court's denial of their opportunity to cross-examine Probst about his "bias" violated their Confrontation Clause rights. But because they fail to develop an argument, this Sixth Amendment claim is waived. *Lanzotti*, 205 F.3d at 957.

Finally, Probst accused Agent Kress of stealing jewelry in connection with another drug investigation, and of failing to report for surveillance duties and of filing false reports on the Claiborne investigation.[4] The defendants argue that this evidence impeaches Kress's credibility, and is thus material to the outcome of the trial.

The district court concluded that Kress's alleged theft was not admissible or material for several reasons. *Willis*, 43 F.Supp.2d at 881. First, Woolley investigated Probst's accusation months before the trial and found that it was unsubstantiated, and nothing more came from the accusation before or after the trial. *Id.* Thus the district court determined that the alleged theft was excluded under Rule 403 because its probative value (to impeach Kress) was "substantially outweighed by the danger of sidetracking the jury with a speculative accusation." *Id.* at 881. Additionally, the court reasoned that because Kress was called to testify as a defense witness for Epison, and his testimony only involved Epison, Kress's veracity was not relevant to the other defendants, as was evident by the fact that none of them bothered to cross-examine Kress at the trial. *Id.* The defendants, therefore, could only have used Kress's alleged theft "to smear the entire prosecution team," which the court concluded would not

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[4] We also note that while the defendants mention DEA misconduct concerning the wiretap in the Claiborne investigation, they fail to challenge the district court's finding that they waived any *Brady* arguments concerning the wiretap by failing to make any "conscientious argument showing that Probst's allegations about inaccurate record-keeping and other irregularities were true and that the irregularities prejudiced them." *Willis*, 43 F.Supp.2d at 883.

have been allowed under Rule 403.[5] *Id.* And we see no need to second-guess that evidentiary ruling. *See Crockett*, 979 F.2d at 1211.

A reasonable person could certainly agree with the trial judge's well-reasoned and thorough analysis of the admissibility and materiality of the Probst information, and thus there was no abuse of discretion in his denial of those *Brady* claims. *Hartbarger*, 148 F.3d at 786.

b) The Wooten Information

The defendants also argue that the Wooten information (related to his theft and his alleged mishandling of evidence) warrants a new trial because it impeaches Wooten's credibility and discredits the integrity of the evidence. In support of their contention, the defendants emphasize that because Wooten was the case agent who oversaw the Claiborne investigation, he was a "linchpin" witness at the trial who testified about the procedures of the investigation and against three defendants.

Wooten was the case agent who testified at the trial about the techniques used in the Claiborne investigation, and as a key witness to surveillance activities involving defendants Larry Martin, Harold Williams and Christopher Epison. It was later revealed that Wooten also stole $12,704.00 in currency seized in the Claiborne investigation, and lied about the theft under oath before eventually admitting to it. Additionally, Wooten stated that DEA

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[5] We also see no abuse of discretion in the district court's finding that the evidence about Kress's alleged theft does not undermine confidence in Epison's conviction. *See infra* note 6.

personnel sometimes stored evidence from the Claiborne investigation in an unsealed condition, and that Woolley once left $800,000.00 of currency overnight in his office, unattended and in unsealed suitcases.

The district court first noted that the defendants had not shown that the storage of evidence actually departed from standard practice, or that the DEA's handling of evidence affected the integrity of any specific evidence presented at the trial. *Willis*, 43 F.Supp.2d at 881-82. Thus the district court concluded that "any evidence of mishandling evidence had insufficient probative value to be admissible under Rule 403 in light of the danger of getting sidetracked on issues of minimal importance. This was a trial on specific criminal charges against Defendants, not a test of the general work habits of Group 12." *Id.* at 882. We conclude that it was reasonable for the district court to be concerned about the danger of sidetracking the jury with a mini-trial about the investigatory procedures of Group 12, and thus it did not abuse its discretion. *See White v. United States*, 148 F.3d 787, 792 (7th Cir. 1998).

Concerning Wooten's theft, the district court deemed that evidence admissible and assumed that the jury would have thus "declined to rely on any testimony Wooten gave." *Willis*, 43 F.Supp.2d at 885. Then the court concluded that because there were other government witnesses and evidence that supplied or could have supplied the same general information about the procedures of the investigation that Wooten supplied as the case agent, his general role as the case agent was not material to the defendants' convictions. *Id.*

The district court then determined whether Wooten's testimony had a material affect on any of the three defendants he testified against. Concerning Larry Martin, the court noted that four cooperating witnesses (who are confessed criminals) testified that Martin was involved in narcotics dealing in the 44th and Greenwood area in Chicago. *Id.* According to the court, Wooten also gave substantial concrete testimony against Martin about volumes of phone calls from Martin's townhouse to pagers, and Wooten's observations of Martin taking money from, and associating with, drug dealers, including Claiborne. *Id.* at 886. But the court emphasized that Martin himself took the stand, and "appeared like a guilty person trying to outsmart the Government." *Id.* at 887. According to the district court, Martin failed to explain how he lived on a limited income as an alley mechanic, but paid for a house with $44,000.00 in $20.00 bills, and drove four vehicles. *Id.* The court also determined that Martin admitted to evading federal agents, failed to sufficiently explain why he frequently used public phones near his home, and failed to explain that while he lived and worked in the 44th and Greenwood area, associated with Claiborne, and knew that his phone was tapped, Martin was still unaware of drug dealing in his neighborhood. *Id.* The district court found that Martin "displayed an evasive and arrogant demeanor on the stand," and concluded that its confidence in Martin's conviction was not undermined by Wooten's theft. *Id.* at 887.

Because the trial judge had the best opportunity to observe Martin's behavior as a witness, we accept his credibility findings unless they are clearly erroneous. *United States v. Stokes*, 211 F.3d 1039, 1045 (7th Cir. 2000).

A finding is clearly erroneous if the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *United States v. Suarez*, 225 F.3d 777, 779 (7th Cir. 2000) (quoting *United States v. Sauerwein*, 5 F.3d 275, 278 (7th Cir. 1993)). In this case, the district court's finding that Martin appeared like a guilty person is well-supported and thus not clearly erroneous. Furthermore, because four cooperating witnesses other than Wooten provided independent and corroborating evidence of Martin's guilt, the district court did not abuse its discretion in concluding that Wooten's testimony was not material to Martin's conviction. *United States v. Gonzalez*, 93 F.3d 311, 317 (7th Cir. 1996) (because there is independent corroborating evidence of the defendants' guilt, there is no reasonable probability that the undisclosed evidence would have changed the outcome of the trial).

Wooten also testified against Harold Williams, stating that on one occasion, Wooten observed Williams getting into a car and driving away from Claiborne's residence. But the district court explained that more damaging testimony implicating Williams in the conspiracy was provided by two cooperating witnesses who said that Williams sold drugs in the 44th and Greenwood area, by two police officers who arrested Williams while he was distributing cocaine in the same area, by another police officer who testified that Williams was stopped with cocaine in his car and admitted that the cocaine was his, and by Probst who corroborated Wooten's testimony. *Willis*, 43 F.Supp.2d at 889. Thus the district court concluded that the disclosure of Wooten's theft does not undermine confidence in Williams's conviction. *Id.* And because a reasonable person could certainly agree with

the district court, there was no abuse of discretion. *Silva*, 71 F.3d at 670.

Wooten also testified against Christopher Epison at the trial, stating that on one occasion he saw Epison engage in a drug transaction with Gary Igert (a Claiborne customer and co-defendant), and that, on another occasion, Wooten saw Epison leave one of Claiborne's apartments with two bags that he threw into a dumpster, one of which contained three smaller plastic bags with cocaine residue. The district court noted that Wooten's testimony about Epison and Igert was corroborated by another police officer and Probst, and that additional, circumstantial evidence portrayed Epison as a "bag man" and "gofer" for Claiborne. *Willis*, 43 F.Supp.2d at 888. Moreover, a cooperating witness testified that Epison worked on cars for Claiborne, and that she once heard Claiborne ask Epison to deliver an "eight ball" (slang for a certain amount of cocaine). *Id.* at 887. Further testimony at the trial revealed that the police once pulled Epison's truck over and took a bag containing $30,000 off the seat. According to the district court, the only uncorroborated evidence was Wooten's identification of Epison as the man who threw the bags into the dumpster because Agent Kress, who was on the same surveillance operation, was unable to make the same identification. *Id.* The trial judge concluded that its confidence in the outcome against Epison is not undermined because "Wooten's testimony about the trash evidence was a small link in an otherwise substantial chain of circumstantial evidence." *Id.*

Again, we see no abuse of discretion in the district court's conclusion that the impeachment value of

Wooten's theft was not material to Epison's conviction. Not only did Probst and a police officer (Officer Brady) corroborate Wooten's testimony about the transaction between Epison and Igert, Probst and Brady also took several photographs of Igert handing cash to Epison. Moreover, Epison's counsel had already attacked Wooten's credibility at the trial by arguing that Wooten's testimony was internally inconsistent and contradicted Agent Kress's version of the dumpster surveillance. Thus further impeachment evidence of Wooten probably would have been cumulative.[6] *United States v. Kozinski*, 16 F.3d 795, 819 (7th Cir. 1994) (evidence that impeaches an already thoroughly impeached witness is the definition of "cumulative impeachment" evidence that does not give rise to a *Brady* violation).

c) The Cumulative Effect

The defendants also argue that the cumulative effect of all of the *Brady* evidence undermines confidence in the outcome of the trial and thus warrants a new one. The district court must also consider the cumulative effect of suppressed evidence to determine whether that effect

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[6] We also agree with the district court that taking this evidence (about Epison's alleged dumping of plastic bags) out of the case entirely does not prompt a new trial because there is no indication that Epison was aware of the contents in the bags, and because the evidence about the cocaine residue may only suggest his personal use and not his participation in the conspiracy. *Willis*, 43 F.Supp.2d at 888. Therefore, the evidence of Wooten's theft *and* Kress's alleged theft are not material under *Brady*, because their testimonies about Epison were not material to his conviction.

was material to the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). In this case, the trial judge recognized that the only *Brady* evidence deemed admissible was Wooten's theft, and because the court had already found that Wooten's entire testimony was not material to the outcome of the trial, the cumulative effect was negligible as well.[7] *Willis*, 43 F.Supp.2d at 889. The district court's conclusion was reasonable, as it already found that other witnesses and evidence could have supplied the same general information that Wooten supplied as the case agent, and that his testimony was not material to the convictions of any of the defendants.

d) Motions for an Evidentiary Hearing

Some of the defendants also moved for an evidentiary hearing concerning their new trial motions. The district court denied their motions, concluding that the defendants conducted "considerable discovery and won favorable discovery rulings," and that, "[a]fter all this, an evidentiary hearing would amount to a fishing expedition." *Id.* at 890. On appeal, the defendants argue that an evidentiary hearing is needed because the district court impermissibly weighed the evidence of Probst's allegations (of racial bias among Group 12 agents and Kress's theft) in favor of the government.

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[7] The district court also found that other suppressed evidence about drug use by a government witness named Eduardo Castillo was admissible, but because the defendants have failed on appeal to provide legal support for a *Brady* argument about Castillo's testimony, it is waived. *Lanzotti*, 205 F.3d at 957.

"We review the district court's decision not to hold a hearing prior to ruling on the Rule 33 motion for an abuse of discretion." *United States v. Walker*, 25 F.3d 540, 548 (7th Cir. 1994). And because the district judge also presided over the trial, particular deference is due to his determination of the necessity of an evidentiary hearing. *Aleman*, 878 F.2d at 1012. Contrary to the defendants' assertions, the district court did not weigh the evidence of Probst's accusations, but made evidentiary rulings pursuant to Rules 403 and 608(b). And because the court also determined that Probst's accusations were not material (as well as not admissible) to the outcome of the trial, the defendants have failed to identify a material factual dispute necessitating a hearing; and thus we see no abuse of discretion. *United States v. Rodriguez*, 69 F.3d 136, 141 (7th Cir. 1995).

2. Newly discovered evidence.

The defendants argue in the alternative that the Probst and Wooten information warrant a new trial according to the standard for newly discovered evidence. "To receive a new trial based on newly discovered evidence, the defendant must demonstrate that the evidence (1) came to their knowledge only after trial; (2) could not have been discovered sooner had due diligence been exercised; (3) is material and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a retrial." *Woolfolk*, 197 F.3d at 905. We review the district court's denial of a motion for a new trial based on newly discovered evidence for abuse of

discretion. *United States v. Ryan*, 213 F.3d 347, 351 (7th Cir. 2000).

The defendants claim that the undisclosed information, along with the newly discovered evidence about two post-trial events, Probst's 1994 settlement of his civil rights lawsuit and Wooten's 1995 guilty plea to fraud charges, would probably lead to an acquittal in the event of a retrial. The district court first considered Probst's 1994 settlement, noting that because the DEA never admitted liability in that case, the settlement does not demonstrate that Probst's accusations of DEA racism and misconduct were accurate, and thus information about the settlement would probably not lead to an acquittal in the event of a retrial. *Willis*, 43 F.Supp.2d at 883. The court also considered Wooten's 1995 guilty plea to fraud charges, and concluded that because the guilty plea is merely cumulative to the impeaching effect of the theft, it is not probable that information about the guilty plea would lead to an acquittal at a retrial. *Id.* at 885. Aside from the strong probability that Wooten would not have been a prosecution witness had the government known of the theft charge at the time of trial, *see United States v. Garcia*, 13 F.3d 1464, 1472 (11th Cir. 1994), as shown above there was plenty of evidence to convict the defendants even without Wooten. And any retrial would no doubt include the substantial evidence of the defendants' drug involvement plus an untainted agent testifying in place of Wooten. The newly discovered impeachment evidence would not shield the defendants' guilt. Because a reasonable person could certainly agree with the district court, we see no abuse of discretion.

B. The New Sentences

Two defendants, Stanley Wright and Harold Williams, also challenge their new sentences on appeal, arguing that the district court erred in refusing to grant the government's §5K1.1 motion for a downward departure, in denying the defendants a two-point reduction in their base offense levels for acceptance of responsibility, and in denying the defendants a two-point reduction for their alleged role as minor participants in the conspiracy.

As noted earlier, this court ordered new sentencings for Wright and Williams, directing the district court to carefully examine whether the defendants played minor roles in the offense and thus were entitled to a downward departure. *Willis*, 49 F.3d at 1274-75. On remand, Wright and Williams entered into a cooperation agreement with the government in which the defendants waived their rights to appeal and provided information to the government about the drug dealing operations in the 44th and Greenwood-Berkeley area in exchange for the government's §5K1.1 recommendation. The district court denied the government's recommendation, concluding that because now new trial was pending, the defendants' cooperation was untimely and not valuable.

Wright and Williams argue on appeal that the district court erred in denying the government's § K1.1 recommendation. We lack jurisdiction to review a district court's refusal to depart downward unless the sentence was imposed in violation of the law or as a result of an incorrect application of the guidelines. *United States v. Winters*, 117 F.3d 346, 348 (7th Cir. 1997). The defendants' claims are based on the argument that the district court was unduly concerned with the value and timeliness of

their cooperation, and thus these claims fail because the defendants fail to make an argument that allows us to have jurisdiction to review the denial of the downward departure motion.

Wright and Williams also admitted their guilt for the first time on remand, and thus they requested the district court to grant them, under § 3E1.1, a two-point reduction in their base offense levels for acceptance of responsibility. The district court denied the defendants' requests, finding that their acceptance of responsibility was untimely because they first acknowledged their guilt after their convictions were affirmed on appeal.

The defendants claim that the district court erred in denying their request for a reduction under § 3E1.1. "a district court's decision whether to grant [a § 3E1.1] reduction is a factual one that is reviewed for clear error." *United States v. Howard*, 179 F.3d 539, 544 (7th Cir. 1999). The "central purpose" of the acceptance of responsibility provision is to "reward those who plead guilty – saving the judiciary and Government from the time, expense and effort of trial." *United States v. Bonanno*, 146 F.3d 502, 512-13 (7th Cir. 1998) (quoting *United States v. Morgano*, 39 F.3d 1358, 1377-78 (7th Cir. 1994)). Accordingly, the timeliness of the defendants' acceptance of responsibility is an appropriate consideration for the district court. *See* U.S.S.G. § 3E1.1, cmt. n. 1(h) (1998); *United States v. Salvador*, 18 F.3d 1380, 1382 (7th Cir. 1994). A defendant may still demonstrate acceptance of responsibility even after he exercises his constitutional right to a trial, but only in rare cases where a defendant goes to trial to preserve issues that do not relate to factual guilt. U.S.S.G. § 3E1.1, cmt. n. 2 (1998).

Here, the district court found that the defendants did not cooperate with the government until years after they were convicted and their convictions were affirmed on appeal, and that they proceeded to trial to deny the essential factual elements of their guilt. These findings are not clearly erroneous, and thus the district court permissibly concluded that the defendants were not entitled to a departure.

Finally, the defendants sought two-point reductions, pursuant to U.S.S.G. § 3B1.2(b), in their base offense levels for being minor participants in the overall conspiracy. The district court denied the defendants' requests, finding that they were not minor participants because they should have foreseen the distribution of 12.5 kilograms of cocaine base in the 44th and Greenwood-Berkeley area, and because each defendant personally handled over 1.5 kilograms of cocaine base, an amount that alone fully supports their sentences.

The defendants contend that the district court erred in denying their request for a reduction under § 3B1.2(b), claiming that the district court "completely ignored" their status as mere "street dealers" in the conspiracy, failed to make an inquiry into the defendants' awareness of the scope of the drug operation in the 44th and Greenwood-Berkeley neighborhood, merely estimated the quantity of drugs involved in the neighborhood operation, and ignored the sentencing testimony of Althonso Wright, a witness who indicated a more limited involvement of the defendants in the conspiracy.

We review for clear error the court's factual determination of a defendant's relative culpability under

§ 3B1.2(b), *United States v. Brisk*, 171 F.3d 514, 526 (7th Cir. 1999), as well as the sentencing judge's findings on the amount of drugs involved in a conspiracy. *United States v. Campbell*, 985 F.2d 341, 346 (7th Cir. 1993). And in a drug distribution conspiracy, a defendant is accountable for the conduct of others if the conduct was in furtherance of the conspiracy and reasonably foreseeable in connection with the conspiracy. *United States v. Brack*, 188 F.3d 748, 766 (7th Cir. 1999); U.S.S.G. § 1B1.3(a)(1), Application Note 2.

Here, this court remanded the case for new sentencings of Wright and Williams because of a concern that the defendants may be entitled to a reduction for being minor participants if they were held to the entire amount of the conspiracy's sales of approximately 216 kilograms over the defendants' 18-month involvement in the conspiracy. *Willis*, 49 F.3d at 1274. This court also recognized, however, that the reduction may not be appropriate of the defendants' "restricted role[s] were recognized in some other way," as, for example, if the district court were to decide on remand that the defendants "knew only about the cocaine being distributed on the street in [their] vicinity." *Id.* at 1275.

On remand, the sentencing judge specifically acknowledged the defendants' status as street dealers, and considered and rejected Althonso Wright's testimony because it conflicted with other evidence and came from a convicted felon. The court found that the defendants were "part of a close-knit group of friends and relatives who worked together to sell drugs in this [44th and Greenwood-Berkeley] area as part of the Claiborne conspiracy." Additionally, the court specifically found that

Wright and Williams were involved in the conspiracy for approximately 18 months, and that it was reasonably foreseeable to them that an estimated 25 kilograms of drugs (half of which (12.5 kilograms) was cocaine base) were sold in the neighborhood during their period of involvement. The sentencing court's estimate of the total quantity of drugs sold in the defendants' neighborhood was reasonable and not clearly erroneous. *See Campbell*, 985 F.2d at 346 (co-conspirators may be "responsible for the total quantity of drugs in which the conspiracy they joined can reasonably be estimated to have dealt."). Moreover, the sentencing judge found that each defendant personally distributed more than 1.5 kilograms of cocaine base during their involvement in the conspiracy, a finding that is not challenged by the defendants, and which sufficiently supports the highest offense level for drug offenses, and thus, the court concluded, disqualifies the defendants from minimal participant reductions. We see no error in the sentencing court's findings concerning drug quantities and the defendants' relative culpability.

III.

The district court's opinion was thorough and well-reasoned. The court did not abuse its discretion in denying the defendants' motions for a new trial and evidentiary hearing, and the court did not err in denying Wright's and Williams's requests for downward departures of their sentences. For the reasons stated here and in the opinion of the district court, we AFFIRM the district court.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 7, 2001

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

Nos. 99-1679, 99-1680,
99-1687, 99-3556 & 99-3557

United States of America,

Plaintiff-Appellee,

v.

Larry Martin, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 91 CR 463 -

Rudy Lozano, *Judge.*

ORDER

The unpublished order issued in this case on December 22, 2000 is corrected as follows:

P.5, third full paragraph, last two sentences are changed to read: "Agent Probst believed that he was being investigated in retaliation for his complaints that Wooten, a black agent, was being mistreated because of his race."

P.6, lines 3-6 are changed to read: " . . . the investigation by failing to properly conduct and report on surveillance activities. The defendants argue that Probst's accusations discredit the investigation because they indicate that Group

> 12 agents were racists who disrupted an investigation that was headed by Probst and Wooten and targeted black defendants."

Defendants-Appellants filed a petition for rehearing *en banc* on January 24, 2001. No judge in regular active service has requested a vote on the petition for rehearing *en banc,* and all of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED.